

MEMORANDUM OF UNDERSTANDING
between
ENVIRONMENTAL PROTECTION AGENCY REGION IX
and
USDA FOREST SERVICE REGION 6
Concerning
THE BLUE LEDGE MINE MIXED OWNERSHIP SITE

I. BACKGROUND

A. The purpose of this Memorandum of Understanding (MOU) is to provide a framework for the United States Environmental Protection Agency (EPA), Region IX, and the United States Department of Agriculture (USDA) Forest Service (Forest Service), Region 6 (collectively, the Parties), to coordinate response actions at the Blue Ledge Mine Site in Siskiyou County, California (the Site).

B. This MOU is intended to implement, and to be consistent with the STATEMENT OF PRINCIPLES FOR COLLABORATIVE DECISION MAKING AT MIXED OWNERSHIP SITES, executed by EPA, USDA and the United States Department of the Interior, which became effective on August 29, 2007. In that Statement of Principles, the Parties recognized that, to expeditiously and efficiently implement the necessary response actions at mixed ownership sites, they should coordinate their respective authorities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.*

C. Pursuant to CERCLA, the President has the authority to respond to releases of pollutants, contaminants, and hazardous substances to protect the public health or welfare or the environment.

D. Pursuant to Executive Order 12580, as amended by Executive Order 13016, the President delegated authority to several executive departments and agencies, including EPA and USDA, to conduct various activities under CERCLA. These activities include investigations and response activities (42 U.S.C. § 9604), abatement actions (42 U.S.C. § 9606), cost recovery (42 U.S.C. § 9607) and entering into agreements with potentially responsible parties (PRPs) for the performance of work (42 U.S.C. § 9622).

E. The Secretary of Agriculture has re-delegated the authorities under Executive Order 12580 to the Forest Service with respect to land and facilities under Forest Service jurisdiction, custody or control (hereinafter referred to as National Forest System lands or NFS lands).

F. The Forest Service administers National Forest System lands on behalf of the public. The Forest Service is, with certain limitations, delegated the President's CERCLA authority where a release of a hazardous substance is on or the sole source of the release is from National Forest System lands. Executive Order 12580 §§ 2(e)(1), and 4(b)(1). Executive Order 13016 amended Executive Order 12580 to authorize the Secretary of Agriculture's use of CERCLA Section 106,

42 U.S.C. § 9606, to address releases or threats of releases affecting lands/facilities and natural resources under the Forest Service's jurisdiction, custody or control subject to the concurrence of EPA's Administrator. Executive Order 13016 § 2. The Secretary of Agriculture has redelegated his CERCLA Section 106 authority to the Director of the USDA Office of Procurement and Property Management and, with respect to NFS lands, to the Chief of the USDA Forest Service, to be exercised with the concurrence of the General Counsel. 7 C.F.R. § 2.93(a)(17)(xiv).

G. By Executive Order 12580, EPA generally has been delegated the President's CERCLA authority where a release or threat of release of pollutants and contaminants or hazardous substances occurs on private property.

H. The Site is a mixed-ownership facility, at which releases of hazardous substances or pollutants and contaminants are located partially on private land and partially on NFS lands. The NFS lands portion of the Site is administered by the Rogue River-Siskiyou National Forest. The mine features at the Site, including the adits, shafts, and waste rock piles, are located principally on the private land portion of the Site. A map of the Site is attached to and incorporated into this MOU as Attachment A.

I. In 2002, the Forest Service contracted for the performance of a Preassessment Screen (PAS). This PAS was undertaken in order to review available information rapidly and determine whether there was a reasonable probability of making a successful natural resource damage claim under CERCLA. In the final PAS, completed on October 28, 2002, the Forest Service determined that all of the criteria for a natural resource damage assessment under CERCLA had been met. In particular, the Forest Service determined that natural resource damages have likely occurred in and around Joe Creek, a permanent water course that services the small community of Joe Bar, California, about three miles downstream, and also in and around Elliott Creek downstream of Joe Creek, the Applegate River downstream of Elliott Creek, and the nearby Applegate Reservoir.

J. On September 12, 2005, EPA determined that acid mine drainage (AMD) and other heavy metal contamination (primarily lead and arsenic) from the Blue Ledge Mine created an imminent and substantial endangerment to the public health or welfare or the environment pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). The AMD is the result of mining activities and waste rock dumped in the course of mine operations, through which a stream and snow melt percolate. The AMD and heavy metals that discharge from the waste rock and mine adits migrate approximately 800 feet before entering into Joe Creek.

K. After making the endangerment determination, EPA conducted a removal action pursuant to Section 104(a) of CERCLA, 42 U.S.C. § 9604(a). The removal action included the following tasks: stabilizing waste rock to prevent further erosion into water courses; providing soil cover to reduce the likelihood of direct human contact with contaminants from the waste rock; and creating a system of barriers and drainage systems to reduce the localized AMD and heavy metal impacts on Joe Creek. While this removal action was intended to mitigate the acute endangerments from the Blue Ledge Mine, EPA did not expect that this action would be a

complete remedy for hazardous substance contamination at the Site.

L. The Parties have determined that additional response actions may be needed to reduce or remove the threats to human health or the environment at the Site. EPA and the Forest Service plan to assess the continued threats of releases of hazardous substances into the environment through the coordinated exercise of the agencies' respective CERCLA authorities.

M. The United States has filed a proof of claim in the Chapter 11 bankruptcy proceeding concerning ASARCO, LLC, in the United States Bankruptcy Court for the Southern District of Texas, including a claim for past and future response costs and the Forest Service claim for natural resource damages at the Site. In February 2008, the Forest Service and EPA were notified that the ASARCO Environmental Trust Calendar Year (CY) 2008 Budget would provide funding in an amount not to exceed \$270,000 for the performance by the Forest Service of a CERCLA Engineering Evaluation/Cost Analysis (EE/CA) at the Site during calendar year 2008. This Trust is funded by ASARCO, Inc., a potentially responsible party at the Site, pursuant to a 2003 Consent Decree captioned United States of America v. ASARCO, Inc., and Southern Peru Holdings Corp., No. CV 02-2079-PHX-RCB (D. Ariz.).

N. All response actions covered by this MOU shall be in accordance with the National Contingency Plan (the NCP), 40 C.F.R. Part 300, including coordination with state regulatory agencies.

II. COORDINATION AND COOPERATION

A. EPA and the Forest Service have designated the following persons to be involved in the day-to-day coordination, communications and decisions regarding the exercise of the agencies' respective authorities at the Site. Each agency will notify and consult with the other as soon as practical regarding plans to change persons or positions.

The Forest Service Principal Contact (Forest Service PC) is:

Peter A. Jones, RG, CEG
Geological Engineer
Rogue River-Siskiyou NF
Office: 541-858-2362
Cell: 541-951-1429
Fax: 541-858-2220
e-mail: pajones@fs.fed.us

The EPA Principal Contact (EPA PC) is:
Will Duncan
Federal On-Scene Coordinator
EPA Region IX
Office: 415-972-3412

Fax: 415-947-3518
e-mail: duncan.will@epa.gov

B. Consistent with Executive Order 12580 and the NCP, EPA is the lead agency for the private portions of the Site and the Forest Service is the lead agency for the NFS portion of the Site with respect to response actions taken pursuant to Section 104 of CERCLA. EPA and the Forest Service will coordinate the exercise of their respective lead agency authority through the issuance of coordinated CERCLA decision documents, such as action memoranda, for response actions at the Site. EPA and the Forest Service recognize that, for purposes of efficiency and effectiveness, it may be appropriate for the Parties to designate one agency to take the principal responsibility for implementation of a particular response action or the response action as a whole at the Site. Because the EE/CA is being funded through the CY2008 ASARCO Environmental Trust, the PRP at the Site is funding this phase of the work, and there is no need for a separate fund-obligating document relating to the EE/CA. In the event that the United States obtains additional funds for this Site in the bankruptcy proceeding, EPA and USDA may address the management of such funds in a separate agreement.

C. The EPA PC and the Forest Service PC shall coordinate with each other to implement response actions at the Site. This coordination should include reasonable prior notice of, and an opportunity to participate in, any scheduled meetings related to activities at the Site, and an opportunity to participate in any scheduled meetings with contractor(s), the State of California and other interested persons regarding the Site. In the event that a meeting needs to be scheduled on shorter notice, the Forest Service PC or the EPA PC shall contact his/her counterpart and shall determine the counterpart's availability prior to scheduling the meeting.

D. Legal issues shall be coordinated among EPA and USDA counsel, and, as appropriate, the Department of Justice.

E. The Parties will coordinate and exercise their respective CERCLA response and enforcement authorities as appropriate to ensure that timely Site access and response are obtained.

F. The Parties also will cooperate in attempting to obtain any potentially available funding for potentially necessary future Site work, including potential future funding out of the ASARCO Environmental Trust and the bankruptcy proceeding.

III. DISPUTE RESOLUTION

A. Consultation between the EPA PC and the Forest Service PC should resolve the vast majority, if not all, technical issues between EPA and the Forest Service. If the EPA PC and the Forest Service PC do not reach agreement on a disputed item arising from activities at the Site, the issue should be elevated to the appropriate senior management at the Forest Service and EPA for further discussion and resolution.

B. If the EPA and Forest Service PCs do not reach agreement on a disputed item arising from

activities that affect NFS lands at the Site, the issue will be elevated to their direct supervisors within seven (7) days. If the direct supervisors are unable to reach agreement within fourteen (14) calendar days, the issue will be further elevated to the Director of Engineering for the Forest Service and the Regional Superfund Division Director for EPA. Absent a resolution of any dispute so elevated, EPA and the Forest Service retain all rights to take such action and pursue whatever recourse may be available and within their respective authorities.

IV. LIMITATIONS AND OTHER PROVISIONS

A. The Forest Service and EPA reserve their rights and authorities under CERCLA, as well as other laws, the NCP, and applicable Executive Orders. No provision of this MOU in any way limits those rights and authorities.

B. Nothing in this MOU shall be considered as obligating EPA or the Forest Service to expend, or as involving the United States, in any contract or other obligation for the future payment of money. The Parties recognize that each must operate within the requirements of the federal budget process and legal restrictions concerning obligations of funds. No provision of this MOU shall be construed to require the Parties to obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.

C. This MOU is neither a fiscal nor a funds obligation document. Any endeavor involving reimbursement, contribution of funds, or transfer of anything of value between the Parties to this MOU will be handled in accordance with applicable laws, regulations, and procedures including those for Government procurement. Such endeavors will be outlined in separate agreements that shall be made in writing by representatives of the Parties and shall be independently authorized by appropriate statutory authority. This instrument does not provide such authority.

D. This MOU is not intended to, and does not, create any right, benefit or trust obligation, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

E. Nothing in this MOU shall restrict the Forest Service or EPA from participating in similar activities with other public or private agencies, organizations, and individuals.

F. This MOU does not relate to the assessment, investigation, or mitigation of natural resource damages and does not affect the enforcement discretion of Federal Natural Resources Trustees or any other agency.

G. This MOU may be executed in counterparts by each of the signatories. Each of the counterpart documents shall be deemed an original, but together shall constitute one and the same instrument.

H. This MOU terminates five (5) years after the effective date. Either signatory may terminate

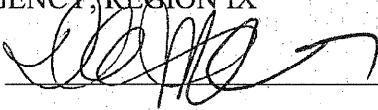
this MOU upon thirty (30) days written notice. Prior to termination, this MOU may be modified or extended only upon the written agreement of both parties.

I. This MOU is effective as of the date of the last signature.

The undersigned parties hereby agree to the terms and conditions of this Memorandum of Understanding.

ENVIRONMENTAL PROTECTION AGENCY, REGION IX

Date: 10/30/2008

By: 

USDA FOREST SERVICE, REGION 6

Date: 12/8/08

By: 